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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION
14

15 **KENNETH DONALD McCURDY,**

16 Petitioner,

17 v.

18 **BEN CURRY, Warden, et al.,**

19 Respondent.

CV07-05084 CW

**REPLY TO PETITIONER'S
OPPOSITION TO MOTION TO
DISMISS**

Judge: The Honorable Claudia Wilken

20
21 On March 21, 2008, Respondent filed a Motion to Dismiss, to which Petitioner filed an
22 Opposition on March 31, 2008. Respondent provides this Reply and asserts that Petitioner's
23 Opposition merely re-asserts the original claims of his federal Petition. Petitioner also claims
24 that because "all documents that are now before this court [have] been ruled on by all the State
25 Courts," he properly exhausted. (Reply at 3.) However, even if the documents are identical in
26 both pleadings, this does not mean that Petitioner fairly presented the same federal issues to the
27 state court. *See Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended by* 247 F.3d 904
28 (9th Cir. 2001). Because Petitioner failed to show that he presented to the California Supreme

1 Court the claim that the Board's reliance on unchanging factors violated his federal right to due
2 process, the district court must dismiss the petition. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982)

3 In addition, Petitioner erred when opposing Respondent's argument that he fails to allege
4 any basis for this Court to grant relief under AEDPA. Petitioner asserts that he did not address
5 this issue because "it is a [sic] EX POST FACTO law and therefore does not pertain to the
6 current issues before this court at this time." (Reply at 2 [emphasis in original].) Petitioner does
7 not cite to any legal authority in support of the contention that AEDPA is an ex post facto law,
8 nor explain his argument further. Accordingly, Petitioner's claim has no merit or support.

9 Therefore, because Petitioner failed to exhaust state remedies as to all his claims as required
10 under 28 U.S.C. § 2254(b)(1)(A), his Petition should be dismissed.

11
12 Dated: April 9, 2008

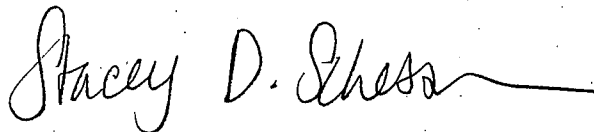
13 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **McCurdy v. Curry**

No.: **CV07-05084 CW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 9, 2008, I served the attached

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Kenneth Donald McCurdy
C-76230
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960-0689
In Pro Per
C-76230

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 9, 2008, at San Francisco, California.

L. Santos

Declarant



Signature